United States Court of Appeals

for the Second Circuit

APPENDIX

77-1148

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

WILLIAM JAMES MILLER and JAMES STANLEY KORZENEWSKI, JR.,

Appellants.

Docket No. 77-1148

B P/S

JOINT APPENDIX TO BRIEFS
FOR APPELLANTS

Appeal From A Judgment
Of Conviction In The
United States District
Court For The Eastern
District Of New York

UNITED STATES COURT OF APPEALS
FILED
MAY 9 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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Brooklyn, New York 11222
Attorney for James Stanley
Korzenewski, Jr.

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Attorney for Billy Miller

PAGINATION AS IN ORIGINAL COPY

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Docket Entries

JUDGE MAGISTRATE Assign: S

0718 207 1 Disp/Sentence — District Office

MISDEMEANOR Mis — FELONY Fel X

vs. MILLER, BILLY (LAST FIRST MIDDLE)

5 10 76 331

U.S. TITLE SECTION: 21-846

OFFENSES CHARGED: Did conspire with others to manufacture and to distribute phencyclidine

ADDITIONAL COUNTS: 1

U.S. MAG CASE NO

BAIL • RELEASE

Denied — Set: AMT 10 — Fugitive — X Pers. Rec. — PSA — Conditions — Date 5/14/76 — 10% Depos — Surety Bond — Collateral — 3rd Party Custody — Other

II. KEY DATES & INTERVALS

ARREST or: U.S. Custody Began; Summons Served; First Appearance

High Risk Date

INDICTMENT X: Information ☐ 5-10-76; Indict. Waived ☐; Superseding ☐ Indict/Info ☐; In Charging District

ARRAIGNMENT: 5/14/76

1st Plea: XG ☐ G ☐ NOL

Final Plea: ☐ NG ☐ G ☐ NOL

Trial Set For

TRIAL: Voir Dire ☐; Trial Began ☐; Trial Ended 10/28/76

Disposition of Charges: 2-4-77

☐ Convicted — ☐ On All Charg
☐ Acquitted — ☐ On Lesser Offense(s)
☐ Dismissed — ☐ WOP — ☐ W
☐ On Government's Motion

MAGISTRATE

	DATE	INITIAL NO
Search Warrant: Issued / Return		
Summons: Issued / Served		
Arrest Warrant Issued		
COMPLAINT		
OFFENSE (in Complaint)		

INITIAL NO. — OUTCOME

INITIAL APPEARANCE DATE

PRELIMINARY EXAMINATION / REMOVAL HEARING: DATE SET FOR / DATE HELD

DISMISSED — HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT

HELD FOR GJ OR OTHER PROCEEDING IN ANOTHER DISTRICT

NOT HELD — WAIVED

U.S. Attorney or Asst.

Richard Brewster

ATTORNEYS

John T. Callagher
136-21 Roosevelt Ae
Flushing N.Y.
886-2700

(Show names and firm names of other defendants on same indictment)

DiGIOVANNI1 KOPF 2; JOHN DOE 3; PALMINTERI 4; LUCA 5;SZWARZ 6;ROE 7; WALL 9: KORZENIEWSKI 10: JANUSZ 11

DATE	(DOCUMENT NO.) PROCEEDINGS
5-10-76	Before PLATT, J - Indictment filed - bench warrant ordered / Issued
5/14/76	Before COSTANTINO,J.- Case called- deft present without counsel court enters a plea of not guilty- bail set at $10,000.00 P.R. B6 case adjd to 5/21/76 for status repot
5/21/76	Before COSTANTINO,J.- case called- adjd to 6/10/76 for status rep
5/24/76	Notice of appearance filed
6/10/76	Before COSTANTINO,J.-Case called- adjd to 6/25/76 for status repor
6-25-76	Before COSTANTINO, J. - Case called & adj'd to 10-18-76 for trial.
9/13/76	Notice of Omnibus Motion filed; returnable 9/15/76.
9/17/76	Before COSTANTINO, J. - Case called. Motion adjd to 9/24/76.
9-24-76	Before COSTANTINO,J. - Case called. Omnibus motion argued. Granted & denied as indicated.
10/22/76	Before COSTANTINOO J. _ Case called. Deft & Counsel present. Trial resumed. Trial continued to 10/22/76.

FORM AO 256

BEST COPY AVAILABLE

	IV PROCEEDINGS (Continued) PAGE TWO	V EXCLUDABLE DELAY
10-20-76	Before Costantino, J.- Case Called. Deft & Atty. Present. Trial Resumed. Trial continued to 10-21-76	
10-22-76	Before Costantino, J.- Case Called. Deft & Atty. Present. Trial resumed. Trial continued to 10-26-76.	
10-26-76	Before Costantino, J.- Case Called. Deft & Counsel Present. Trial resumed. Motions for judgment of aquittal - Motions denied. Motions to dismiss - Motions denied. Trial continued to 10-27-76.	
10/28/76	Before COSTANTINO, J. - Case called. Deft &Counsel present. Trial resumed. Jurors return with a verdict of guilty as charged. Jury discharged. All motions to be made on sentancing date. Sentence adjd without datee. Bail continued. Trial concluded.	
10/28/76	Stenographers transcript dated 10.20/76, 10/21/76, 10/22/76, 10/26/76, and 10/27/76 filed.	
10-27-76	Before Costantino, J.- Case Called. Deft. & Counsel Present. Trial resumed. Govt. Sums up. Court charges Jurors, Trial continued to 10-28-76.	
10-29-76	By Costantino, J.- order of Transportation - Filed. By Costantino, J.- order of Sustenance - Filed.	
11-18-76	Stenographer's Transcript dated October 28, 1976 filed.	
2.4.77	Before Costantino, J.- Case Called. Deft. & Counsel present. Deft. sentenced for a period of 2 years imprisonment to serve 2 months pursuant to T-18, U.S.C., Section 3651 -execution of remainder of sent suspended and Deft. is placed on probation for a period of 5 years pursuant to T-18, U.S.C., Section 5010(a) and a 2 year special parole term. Special condition that the Probation Department is ordered to submit progress regarding the Deft's. adjustment and college scholarship by 5.30.77 and sentence stayed until 5.30.77.	
2.4.77	Judgment and Commitment filed. Certified Copies to Marshal and Probation.	
2/11/77	Notice of Appeal filed.	
2/11/77	Docket entries and duplicate ofNotice of Appeal mailed to the Court of Appeals.	
4.1.77	Order filed received from the Court of Appeals that the record be filed on or before 4.7.77, in default of which the appeal shall be dismissed.	

2/ 77

Clerk

PERIOD NUMBER	CO. NUMBER

INAL DOCKET - U.S. District Court

0718

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76 CR 331 -10

X KORZENIEWSKI, JAMES

Case Filed Mo. 5 Day 10 Yr. 76

JUVENILE

No. of Defts. 11

U.S. MAG CASE NO.

U.S. TITLE/SECTION: 21-846

OFFENSES CHARGED: Didkconspire with others to manufacture 1 and to distribute phencyclidine

ORIGINAL COUNTS

SUPERSEDING COUNTS

BAIL • REL

Denied

Amt Set

$ 000

Date

Bail Not Made

Status Changed (See Docket)

II. KEY DATES & INTERVALS

ARREST or U.S. Custody Began

Summons Served

First Appearance

In Charging District

INDICTMENT X

High Risk Date

Information

Indict. Waived

Superseding Indict/Info

ARRAIGNMENT

5-10-76

5/14/76

1st Plea

Final Plea

Trial Set For

NG G NOL

G. Plea W/Drawn

NG G NOL

TRIAL

Voir Dire

Trial Began

Trial Ended 10/28/76

Disposition of Charges

Convicted

Acquitted

Dismissed:

On Government's M

SE

2-

MAGISTRATE

	DATE	INITIAL NO.
Search Warrant Issued Returned		
Summons Issued Served		
Arrest Warrant Issued		
COMPLAINT		
OFFENSE (In Complaint)		

INITIAL APPEARANCE DATE

PRELIMINARY EXAMINATION OR REMOVAL HEARING Date Scheduled / Date Held

WAIVED NOT WAIVED

INTERVENING INDICTMENT

Tape Number

INITIAL NO.

OUTCOME

DISP

HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTR

HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT OF

U.S. ATTORNEY OR ASST.

Richard Brewster

ATTORNEYS Defense CJA Ret Waived Self None / Other PD

DiGIOVANNI 1; KOPF 2; JOHN DOE 3; PALMINTERI 4; LUCAS 5; SZWARZ 6; ROE WALL 9; JANUSZ 11

PROCEEDINGS

EXCLUDABL

5/10/76	Before PLATT,J.- Indictment filed- bench warrant ordered ar issued
5/14/76	Before COSTANTINO,J.- Case called- deft and counsel present arraigned and enters a plea of not guilty- case adjd to 5/2 for status report
5/21/76	Before COSTANTINO,J.- Case called- adjd-6/10/76 for status rep
6/10/76	Before COSTANTINO,J.-Case called- adjd to 6/25/76 for report
6-25-76	Before COSTANTINO,J -Case called and adj'd to 10-18-76 for trial.
8-17-76	Demand for Bill of Particulars filed.
9/17/76	Before COSTANTINO, J. - Case called and adjd to 9/24/76.
9-24-76	Before COSTANTINO, J. - Case called. Omnibus motion argued. Granted & denied as indicated.
10/21/76	Before COSTANTINO, J. - Case called. Deft & Counsel present. Trial resumed. Trial continued to 10/22/76.

DATE	IV. PROCEEDINGS (Continued)	PA. NO.	V. EXCLUDABLE DELAY
10-20-76	Before Costantino, J.- Case Called. Deft & Atty. Present. Trial Resumed. Trial continued to 10-21-76.		
10-22-76	Before Costantino, J.- Case Called. Deft & Atty. Present. Trial Resumed. Trial continued to 10-26-76.		
10-26-76	Voucher of Compensation for Expert Services - Filed.		
10-26-76	Before Costantino, J.- Case Called. Deft & Counsel Present. Trial resumed. Motions for judgment of aquittal - Motions denied. Motions to dismiss - Motions denied. Trial continued to 10-27-76.		
10/28/76	Before COSTANTINO, J. - Case called. Deft &Counsel present. Trial resumed. Jury returns with a verdict of guilty as charged. Jury discharged. All motions to be made on senteincing date. Sentence adjd without date. Bail continued. Trial concluded.		
10/28/76	Stenographers transcript dated 10/20/86, 10/21/76, 10/22/76, 10/27/76, and 10/26/76 filed.		
10-27-76	Before Costantino, J.- Case Called. Deft. & Counsel Present. Trial resumed. Govt. Sums up. Court charges Jurors. Trial continued to 10-28-76.		
10-29-76	By Costantino, J.- Order of Transportation - Filed.		
10-29-76	By Costantino, J.- Order of Sustenance - Filed.		
10-29-76	Voucher for compensation for expert services filed		
11-18-76	Stenographer's Transcript dated October 28, 1976 filed.		
2.4.77	Before Costantino, J.- Case Called. Deft. & Counsel present. Deft. sentenced for a period of 3 years to serve 2 months pursuant to T-18, U.S.C., Section 3651. Balance on probation pursuant to T-18, U.S.C., Section 5010(a) and 5 years special parole term. Deft. granted leave to file Notice of Appeal within 10 days or to surrender within that time.		
2.4.77	Judgment and Commitment filed. Certified Copies to Marshal and Probation.		
2/9/77	Notice of Appeal filed.		
2/9/77	Docket entries and duplicate of Notice of Appeal mailed to the C of A.		
3-17-77	Voucher for compensation of atty Rudolph Klenesky filed and forwarded to Chief Auditor for payment		
3/17/77	Copy of demand for bill of Particulars and atty - Rudolph M. Klenosky's affirmation filed.(copy)		
4.1.77	Order filed received from the Court of Appeals that the record be filed on or before 4.7.77, in default of which the appeal shall be dismissed forthwith.		

4/1/77

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RJD:RWB:sr
F.# 761125

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA

- against -

SAVIERO DiGIOVANNI,
STEPHEN KOPF,
JOHN DOE, also known as "Danny",
JOSEPH PALMINTERI,
JUDD LUCAS,
VICTOR SZWARZ,
RICHARD ROE, also known as
"Steve",
BILLY MILLER
JAMES WALL
JAMES KORZENIEWSKI and
MAREK JANUSZ,

Defendants.

- - - - - - - - - - - - - - - - X

INDICTMENT

Cr. No. 76 CR 331
(Title 21, U.S.C., §846)

THE GRAND JURY CHARGES:

On or about and between July 1975 and February 1976, both dates being approximate and inclusive, within the Eastern District of New York, the defendants SAVIERO DiGIOVANNI, STEPHEN KOPF, JOHN DOE, also known as "Danny", JOSEPH PALMINTERI, JUDD LUCAS, VICTOR SZWARZ, RICHARD ROE, also known as "Steve", BILLY MILLER, JAMES WALL, JAMES KORZENIEWSKI and MAREK JANUSZ together with Robert Kuzniewski, named herein as co-conspirator but not as a defendant, and others known and unknown to the Grand Jury, did knowingly and intentionally combine, conspire, confederate and agree together to violate Section 841(a)(1) of Title 21, United States Code.

1. It was part of said conspiracy that the defendants would knowingly and intentionally manufacture, distribute and possess with intent to distribute substantial quantities of phencyclidine, a Schedule III controlled substance.

2. It was further a part of said conspiracy that the defendants would conceal the existence of the conspiracy and would take steps designed to prevent disclosure of their

activities. (Title 21, United States Code, Section 846).

A TRUE BILL

FOREMAN

DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

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2PM

hs fols.

THE COURT: Madam Forelady, ladies and gentlemen of the Jury:

Now that you have heard the evidence and the arguments it becomes my duty to give you the instructions of the Court as to the law applicable to this case.

It is your duty as jurors to fllow the law as stated in the instructions of the Court, and to apply the rules of law so given to the facts as you find them from the evidence in the case.

You are not to single out one instruction along as stating the law, but must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court; just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything but the evidence in the case.

Justice through trial by jury must always

depend upon the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all the jurors; and to arrive at a verdict by applying the same rules of law, as given in the instructions of the Court.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the indictment and the denial made by the "Not-Guilty" plea of the accused. You are to perform this duty without biase or prejudice as to any party.

The law does not permit jurors to be governed by sumpathy, prejudice or bias.

Both the accused and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court and reach a just verdict, regardless of the consequences.

The attorneys, both for the Government and the Defendant, have been permitted by the Court and by the rules to make opening statements and summations to you.

Under no circumstances are the statements they have made by way of opening or by way of

opening or by way of summation to be taken as evidence.

However, the Court and the law does permit you to take the arguments that they have proferred before you and weigh those arguments. And if you agree with what they have said on either side of the case you may use those arguments in your deliberations and in discussing the case with each other, and try to convince one another as to what the final determination shall be with reference to the deliberations at hand.

If you feel that the arguments are not commensurate with the testimony and the proof in the case, you may disregard them. Them arguments are not evidence. You need not weigh them. However, there are times when the arguments of the attorneys will give you an insight as to something you may have missed, and you may discuss that portion of it if you so desire.

As I have already instructed you, the Court will be the judge of the law. You may recall that some motions were argued at side bar or that you were asked to leave the courtroom from time to time.

That was not for the purpose of keeping any

of the proof from you, but were matters of law that were discussed between the attorneys and the Court itself, and should not have come before you.

In any event, if you feel that you had discovered by some stretch of your imagination what this Court thinks as to either some of the testimony or the case itself, you should remove that from your mind because I tell you here and now I have come to no conclusion in this case.

I have not indicated to you in any way whatsoever what my feeling is with reference to the facts in the case, or with reference to the guilt or innocence of the defendants. That is your province and your job. You should not try to weigh what you believe the Court's impression may be.

You must understand that the lawyers who appear before you are advocates. They are advocating the best case they can for the parties they represent and they have a right to exercise as much forcefulness as they desire in their questioning or otherwise in presenting their case.

During my precharge I told you, among other things, that the questions asked by the attorneys are never to be considered as evidence, even though the question may contain a statement of evidence.

You are reminded that only the answer to the question is evidence, if, of course, the question was answered.

Of course you know by now that this case has come before you by way of indictment presented by a Grand Jury sitting in the Eastern District. Remember, an indictment is merely an accusation, merely a piece of paper. It is not evidence and is not proof of anything.

The Indictment:

The indictment in this case reads as follows:

On or about and between July 1975 and February 1976, both dates being approximate and inclusive, within the Eastern District of New York, the defenants Saviero Di Giovanni, Stephen Kopf, John Doe, also known as "Danny", Joseph Palminteri, Judd Lucas, Victor Szwarz, Richard Roe, also known as "Steve," Billy Miller, James Wall, James Korzeniewski and Marek Janusz, together with Robert Kuzniewski named herein as co-conspirator but not as a defendant, and others known and unknown to the Grand Jury, did knowingly and intentionally combine, conspire, confederate and agree together to violate Section 841(z)(1) of Title 21, United States Code.

"1. It was part of said conspiracy that the defendants would knowingly and intentionally manufacture, distribute and possess with intent to distribute substantial quantities of phencyclidine, a Schedule III controlled substance.

"2. It was further a part of said conspiracy that the defendants would conceal the existence of the conspiracy and would take steps designed to prevent disclosure of their activities. (Title 21, United States Code, Section 846.)"

Some of the defendants named in the indictment have not been on trial here; some of them are out of this trial for various reasons. The reasons why the other defendants are not part of this trialhave no bearing whatsoever on the guilt or innocence of either of the defendants who are on trial.

You are not to speculate as to the reasons for the absence from this trial of the other defendants named in the indictment.

You are to consider only the guilt or innocence of the defendants before you here.

The indictment in this case charges a knowing and intentional conspiracy to violate Section

841(a)(1) of Title 21, United States Code. That section provides:

(a) It shall be unlawful for any person knowingly or intentionally:

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance.

The essential elements of the charge involved in this case may be stated as follows: First, there must have been a conspiracy - and I will discuss conspiracy with you shortly.

Second, the purpose of the conspiracy must have been knowingly or intentionally to manufacture, distribute, or dispense with intent to manufacture, distribute or dispense a controlled substance, in this case phencyclidine, or "Angel Dust." Unless you believe beyond a reasonable doubt that the substance involved here was in fact phencyclidine, you cannot find these defendants guilty.

Third, the defendants must have knowingly or intentionally become members of the conspiracy.

Let me state to you here that the burden is upon the prosecution to prove beyond a reasonable doubt each and every essential element of the crime

charged. Failure to do so requires you to find the defendants not guilty. The burden never shifts to the defendants to prove their innocence. The law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

(Cotinued on the next page.)

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Before explaining the concept of conspiracy to you, I will define certain terms which are essential to your deliberations.

First, as I already told you, the Government must prove beyond a reasonable doubt that the defendants acted knowingly and intentionally. An act is done "knowingly" if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

Intent is a state of mind and can be proven by circumstantial evidence. In determining whether the defendants acted knowingly and intentionally, you may consider all the attendant circumstances of the case, including the defendants' conduct.

The mere association of the defendants with each other, however, is not in and of itself sufficient evidence of the knowing participation of the individual defendants in the crime charged in the indictment. There mere presence of the defendants at the time and place alleged in the indictment, without more, is not enough to convict.

What you must find is that each of these defendants, voluntarily and intentionally, by some act or acts on his part, participated in the commission of the crime charged.

The indictment also charges that as part of the alleged conspiracy the defendants would "manufacture," "distribute," and "possess with intent to distribute," phencyclidine.

The term "manufacture" in this context has the same meaning as in any other context; that is, that the members of the conspiracy would make the controlled substance.

The term "distribute" in this context means to deliver a controlled substance to the possession of another person, which in turn means the actual, constructive, or attempted transfer of a controlled substance.

The phrase "possess with intent to distribute" involves two distinct terms - "possession" and "intent."

Before you may find that as part of the alleged conspiracy the defendants possessed phencyclidine with intent to distribute it, you must be convinced beyond a reasonable doubt that they or some other member of the alleged conspiracy (1) possessed phencyclidine; (2) that they or some other member of the alleged conspiracy possessed it with a specific intent to distribute it, as I have

already defined "distribute" for you; and (3) that they or some other member of the alleged conspiracy did so knowingly and intentionally, as I have defined those terms for you.

The law recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and the intention, at a given time, to exercise domination or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

The law also recognizes that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole.

If two or more persons share actual or constructive possession of a thing, possession is joint.

You may find that the element of possession is present if youfind beyond a reasonable doubt that a defendant had actual or constructive possession, either alone or jointly with others.

"Intent" as used in the phrase "possess with intent to distribute," means "specific intent."

Specific intent means more than the general intent to possess the drug.

To establish specific intent the Government must prove beyond a reasonable doubt that the defendants, at the time they possessed the drug, did so intending to distribute it. Such intent may be determined from all the facts and circumstances surrounding the case, but unless this specific intent has been proven beyond a reasonable doubt, the Government has not carried its burden with respect tothe charge of possession with intent to distribute phencyclidine.

This indictment charges a conspiracy to violate the law. The concept of conspiracy is complicated, so I direct you to listen very closely to what I am about to say to you.

These defendants are charged with "conspiring" to manufacture, distribute, or possess with intent to manufacture or distribute, phencyclidine.

In order to convict you must be convinced beyond a reasonable doubt that they knowingly and intentionally entered into a conspiracy. It is not

sufficient that you find that they actually did manufacture, distribute, or possess with intent to distribute, the drug.

On the other hand, it is not necessary that you find that these particular defendants did in fact manufacture, distribute or possess with intent to distribute, phencyclidine.

What you must find, in order to convict, is that the defendants knowingly and intentionally entered into an agreement to violate the law, whether or not that agreement was ever carried out by them. It is the conspiracy itelf which constitues the crime, and I will not discuss "conspiracy" with you.

A conspiracy is a combination of two or more persons, by concerted action, to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means. So a conspiracy is a kind of "partnership in criminal purposes," in which each member becomes the agent of every other member. The gist of the offense is a combination or agreement to disobey, or to disregard, the law.

Mere similarity of conduct among various persons, and the fact they may have associated with

each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy.

However, the evidence in the case need not show that the members entered into any express or formal agreement, or that they directly, by words spoken or in writing, stated between themselves what their object or purpose was to be, or the details thereof, or the means by which the object or purpose was to be accomplished.

What the evidence in the case must shown beyond a reasonable doubt, in order to establish proof that a conspiracy existed, is that the members in some way or manner, or through some contrivance, expressly or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan.

The evidence in the case must also establish beyond a reasonable doubt that the alleged conspiracy was knowingly formed, and that one or more of the means or methods described in the indictment were agreed upon to be used, in an effort to effect or accomplish some object or purpose of the conspiracy, as charged in the indictment; and that two or more

persons, including one or both of the accused, were knowingly members of the conspiracy, as charged in the indictment.

In determining whether there has been an unlawful agreement, you may judge acts and conduct of the alleged members of the conspiracy which are done to carry out an apparent criminal purpose. The adage, "Actions speak louder than words" is applicable here.

(Continued on the next page.)

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Usually, the only evidence available is that of disconnected acts on the part of the alleged individual conspirators, which acts, however, when taken together inconnection with each other and with the reasonable inferences flowing therefrom, show a conspiracy or agreement to secure a particular result as satisfactorily and conclusively as more direct proof.

If, upon such consideration of all the evidence, direct or circumstantial, you find beyond a reasonable doubt that the minds of the alleged conspirators met in an understanding way and that they agreed, as I have explained a conspiratorial agreement to you, to work together in furtherance of the unlawful schemes alleged in the indictment, then proof of the existence of conspiracy is established.

One may become a member of a conspiracy without full knowledge of all the details of the conspiracy. On the other hand, a person who has no knowledge of a conspiracy, but happens to act in a way whch furthers some object or purpose of the conspiracy, does not thereby become a conspirator.

Before the Jury may find that a defendant,

or any other person, has become a member of a conspiracy, the evidence in the case must show beyond a reasonable doubt that the conspiracy was knowingly formed, and that the defenant, or other person who is claimed to have been a member, wilfully participated in the unlawful plan, with the intent to advance or further some objects or purpose of the conspiracy.

To act or participate wilfully means to act or participate voluntarily and intentionally, and with specific intent to do something the law forbids; that is to say, to act or participate with the bad purpose, either to disobey or to disregard the law.

So, if a defendant, or any other person, with understanding of the unlawful character of a plan, knowingly encourages, advises or assists , for the purpose of furthering the undertaking or scheme, he thereby becomes a wilful participant - a conspirator.

One who wilfully joins an existing conspiracy is charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy.

In determining whether a conspiracy existed, the Jury should consider the actions and declarations of all of the alleged participants made in furtherance of the common scheme.

However, in determining whether a particular defendant was a member of the conspiracy, the Jury should consider only his acts and statements. He cannot be bound by the acts or declarations of other participants until it is established that a conspiracy existed, and that he was one of its members.

Whenever it appears beyond a reasonable doubt, however, that a conspiracy existed and that a defendant was one of its members, then the statements thereafter knowingly made and the acts thereafter knowingly done by some other member of the conspiracy, may be considered by you as evidence against the defendant found to have been a member, even though the statements and acts may have occurred in the absence and without the knowledge of that defendant, provided such statements and acts were knowingly made or done during the continuation of the conspiracy, and in furtherance of some object or purpose of the conspiracy.

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Charge

Any statements or acts of any conspirator, which are not made or done in furtherance of the conspiracy, or which are made or done before its existence or after its termination may not be considered as evidence against anyone other than the maker or actor.

The guilt of a conspirator is not governed by the extent or duration of his participation the conspiracy, or whether he had knowledge of all of its operations.

Even if one joined the conspiracy after it was formed, and was engaged in it to a degree more limited than that of other co-conspirators, he is equally culpable, so long as he was a co-conspirator.

Each member of a conspiracy may perform separate and distinct acts at different times and different places. Thus, some conspirators may play major roles, while others play minor parts.

In other words, it is not required that a person be a member of the conspiracy from its very start - he may join it at any point during its progress, and be held responsible for all that has been done before he joined, and all that may be done

thereafter during its existence, and may be charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy.

As to each of the defendants, four essential elements are required to be proved in order to establish the offense of conspiracy charged in the indictment:

First: That the conspiracy described in the indictment was wilfully formed, and was existing at or about the time alleged;

Second: That the accused wilfully became a member of the conspiracy;

Third: That one of the conspirators thereafter committed an overt act in furtherance of the conspiracy; and

Fourth: That such overt act was knowingly done in furtherance of some object or purpose of the conspiracy, as charged.

If you should find beyond a reasonable doubt from the evidence in the case that existence of the conspiracy charged in the indictment has been proved, and that during the existence of the conspiracy some overt act was knowingly done by one

of the members of the conspiracy in furtherance of some object or purpose of the conspiracy, then proof of the conspiracy offense charged is complete.

An "overt act" is any act knowingly committed by one of the defendants or co-conspirators in an effort to effect or accomplish some object or purpose of the conspiracy.

The over act need not be criminal in nature, if considered separately and apart from the conspiracy. It may be as innocent as the act of a man walking across the street, or driving an automobile, or using a telephone.

It must, however, be an act which follows and tends toward accomplishment of the plan or scheme, and must be knowingly done in furtherance of some object or purpose of the conspiracy charged in the indictment.

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In your consideration of the evidence in the case as to the offense of conspiracy charged, you should first determine whether or not the conspiracy existed, as alleged in the indictment.

If you conclude that the conspiracy did exist, you should next determine whether or not the accused wilfully became members of the conspiracy.

If you are not convinced beyond a reasonable doubt from the evidence in the case that the conspiracy alleged in the indictment was wilfully formed, and that one or both of the defendants wilfully became members of the conspiracy either at its inception or afterwards, and that thereafter one or more of the conspirators knowingly committed one or more of the overt acts charged in furtherance of some object or purpose of the conspiracy, then you must acquit each defendant as to whom you have such a reasonable doubt.

If, however, you are convinced of these factors beyond a reasonable doubt, then you may convict each defendant as to whom you have no reasonable doubt.

Let me admonish you here that it is your duty to give separate, personal consideration to the case

of each individual defendant.

When you do so, you should analyze all of the evidence with respect to each defendant separately. You may find both defendants guilty, both defendants not guilty, or one defendant guilty and the other not guilty.

The fact that you may find one of the defendants guilty should not influence your verdict as to the other defendant. You must determine the case of each defendant solely upon that evidence which you find applicable to him.

There are two types of evidence from which you may find the truth as to the facts of a case - direct and circumstantial evidence.

Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness; circumstantial evidence is proof of a chain of facts and circumstances indicating the guilt or innocence of a defendant.

The law makes no distinction between the weight to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case.

After weighing all the evidence, if you are not convinced of the guilt of the defendants beyond a reasonable doubt, you must find them not guilty.

A defendant is presumed innocent of the crime. Thus the defendant, although accused, begins the trial with a clea slate and with no evidence against him, and the law permits nothing but legal evidence to be presented befor a jury tobe considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant unless you, the jury, are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

It is not required that the Government prove guilt beyond all possible doubt. The test is one of reasonable doubt, and reasonable doubt is doubt based upon reason and common sense, the kind of doubt that would make a reasonable person hesitate to act.

Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in the most important of your own

affairs.

You, the Jury, will remember that a defendant is never to be convicted on mere suspicion or conjecture. The burden is always upon the prosecution to prove guilt beyond a reasonable doubt.

This burden never shifts to a defendant. The law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

If the Jury views the evidence in the case as reasonably permitting either of two conclusions, one of innocence, the other of guilt, you, the Jury, must, of course, adopt the conclusion of innocence.

A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon failure of the prosecution fo establish such proof.

You, the Jury, may make common sense inferences from the proven facts.

It is not necessary that all inferences drawn from the facts in evidence be consistent only with guilt and inconsistent with every reasonable hypothesis of innocence.

The test is one of reasonable doubt, and should be based upon all the evidence, the testimony of the witnesses, the documents offered into evidence and the reasonable inferences which can be drawn from the proven facts.

An inference is a deduction or conclusion which reason and common sense lead the Jury to draw from the facts which have been proved.

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the bald statements of the witnesses.

On the contrary, you are permitted to draw, from the facts which you find have been proved, such reasonable inferences as seem justified in the light of your own experience.

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You as jurors are the sole judges of the credibility of the witnesses and the weight that their testimony deserves, and it goes without saying that you should scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and his demeanor and manner while on the stand. Consider the witness' ability to observe the matters as to which he has testified, and whether he impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case, the manner in which each witness might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies, or discrepancies in the testimony of a witness or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently and innocent misrecollection like a failure of recollection, is not an uncommon experience.

In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves.

If you find any witness lied as to any material fact in the case, or willfully testified falsely, then the law gives you certain privileges. One of those privileges is that you have the right to disregard the entire testimony of that witness. If you find, however, that you can sift through that testimony and determine which of the testimony is true and which is false, then the law allows you to take the portions which were true and weigh it and disregard those portions which were false. That again is within your perogative.

The weight of the evidence is not necessarily determined by the number of witnesses testifying on either side. You should consider all the facts and circumstances in evidence to determine which of the witnesses are worthy of greater credence. You may find the testimony of a smaller number of witneses on

one side is more credible than the testimony of a greater number of witnesses on the other side.

You are not obliged to accept testimony, even though the testimony is uncontradicted, and the witness is not impeached. You may decide because of the witness' bearing and demeanor, or because of the inherent improbability of his testimony, or for other reasons sufficient to you, that such testimony is not worthy of belief. The Government is not required to prove the essential elements of the offense as defined in these instructions by any particular number of witnesses. The testimony of a single witness may be sufficient to convince you beyond a reasonable doubt of the existence of an essential element of the offense charged, if you believe beyond a reasonable doubt that the witness is telling the truth.

The testimony of a witness may be discredited, or impeached, by showing that he previously made statements which are inconsistent with his present testimony. The earlier contradictory statements are admissable only to impeach the credibility of the witness and not to establish the truth of those statements. It is the province of the jury to determine the credibility, if any, to be given the testimony of a witness who has

been impeached.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony and other particulars; and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

An act or omission is knowingly done if it is done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

Some of the witnesses who testified before you here were admitted participants in the crime with which these defendants are charged. Such a person, however, does not become incompetent as a witness simply because of his participation in the crime charged. The mere fact that a witness may have participated in the crime charged does not mean that he cannot tell the truth. It only means that you are to examine his testimony with great care, and his having done so, you believe it to be the truth, then you are to give it the same credence as the testimony of other witnesses. The testimony of such a witness alone, if believed by you, may be of sufficient weight to sustain a verdict of guilty even if uncorroborated or unsupported by other testimony. Keep in mind, however, that you must receive such

testimony with caution and weigh it with great care before you accept it. You should not convict on the basis of the unsupported testimony of a participant in the crime unless you believe such testimony beyond a reasonable doubt.

Certain witnesses who have testified before you here have received consideration from the Government in exchange for their testimony. Such testimony must be examined and weighed by you with greater care than the testimony of ordinary witnesses. Again, this does not mean that such persons cannot tell the truth, but you must determine whether such testimony has been affected by interest, or by prejudice against the defendant. If after such consideration you find such testimony to be truthful, you may gauge it whatever weight you believe it deserves.

The law does not require the prosecution to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial. Nor does the law require the prosecution to produce as exhibits all papers and things mentioned in the evidence.

However, in judging the credibility of the witnesses

who have testified, and in considering the weight and effect of all evidence that has been produced, the jury may consider the prosecution's failure to call other witnesses, or to produce other evidence shown by the evidence in the case to be in existence and available.

Where a witness is available to both parties, no unfavorable inference may be drawn as to either party for the failure to call that witness, but you the jury must keep in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witness or producing any evidence, even though such witness or evidence were available to them.

When a defendant in a case of this kind takes the stand, which he has a perfect right to do, he is subjected to all the obligations of witnesses, and his testimony is to be treated like the testimony of any other witness, that is to say, it will be for you to say, remembering the substance of his testimony, the manner in which he gave it, his cross-examination, and everything else in the case, whether or not he told the truth. Then again, it is for you to remember, and you have a perfect right to do so, to very grave interest

the defendant has in the case. As he places himself as a witness, he stands like any other witness.

There is nothing peculiarly different in the way a jury should consider the evidence in a criminal case from that which all reasonable persons treat any question depending upon evidence presented to them. You are expected to use your good sense. You are not to comprimise your positions. Consider the evidence in the case for only those purposes for which it has been admitted, and give it a reasonable and fair construction in the light of your common knowledge of the natural tendencies and inclinations of human beings.

If an accused be proved guilty beyond a reasonable doubt, say so. If not so proved guilty, say so.

Keep constantly in mind that it would be a violation of your sworn duty to base a verdict of guilt upon anything other than the evidence in the case, and remember as well that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witness or producing any evidence.

In making the factual determination on which your verdict will be based, you may consider only the exhibits which have been admitted in evidence, and the testimony of the witnesses as you have heard it in this

courtroom.

The punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the Court and should never be considered by the jury in any way in arriving at an impartial verdict as to the guilt or innocence of the accused.

If any reference by the Court or by counsel to matters of evidence does not coincide with your own recollection, it is your recollection which should control during your deliberations.

Now, in this type of case, there must be a unaimous verdict. That means all 12 of you must agree and it goes without saying that it becomes incumbent upon you to listen to one another and to argue out the points among yourselves in order to determine in good conscience whether your fellow jurors' argument is one commensurate with yours or whether you can in good conscience agree with him. You have no right to stubbornly and idly sit by and say, "I am not talking to anyone. I am not going to discuss it," because people with common sense and the ability to reason must communicate their thoughts. So anything that appears in the record and about which one of you may not agree, talk it out amongst yourselves, and then if

you cannot agree as to what is in the record, you can ask the Court to have that portion of the testimony read back to you. You may do so by knocking on the door and giving a note in writing to the marshal who will then present it to the Court, and I will then bring you into the courtroom for that purpose.

Madame Forelady, you will preside over the deliberations and you will be the spokesman here in the courtroom.

Now, the form of your verdict will be, ladies and gentlemen, if you should find both defendants not guilty, you will announce that "We the jury find the defendants not guilty," keeping in mind that all 12 of you must agree on a verdict in order for that verdict to be announced. It must be a unanimous verdict among the 12 of you.

If you should find both defendants guilty, you will announce that "We the jury find the defendants guilty."

If you should find one guilty and one not guilty, you would of course announce the alternative form to the Court. For instance, you will say, "We find the defendant A guilty and the defendant B not guilty." You would use their names where I used the letters.

So actually there are three forms of verdict that you can bring into this courtroom after you have deliberated and come to a conclusion.

Now, Madame Forelady and ladies and gentlemen of the jury: You have heard the complete charge on the law to be applied to the facts. Is there any part of the charge that you do not understand, about which you might be confused or which you would like to have repeated to you at this time before commencing your deliberations? Of course, you shall have the right to have the Court read back any part of the charge at any time during your deliberations. I assume at this time you have no confusion and you understood the charge. That does not mean that if you discuss it further in your deliberations, and you have a question, you still have a right to come back into the courtroom and have the Court read that portion which you wish to have read back to you. That's the Court's charge.

MR. GALLAGHER: I would like a sidebar?

THE COURT: Swear in the marshal first.

(Marshal sworn.)

(The following transpired at the sidebar.)

MR. GALLAGHER: Your Honor, maybe I misheard what you read. I am referring now to page 44. It is

any further with this questioning.

(The following took place at the side bar.)

MR. KLENOSKY: Your Honor, my purpose in putting this type of question is to show they -- the complete framework of the illegality of the--

THE COURT: It's already conceded. There's nothing legal about this.

MR. KLENOSKY: Insofar as dealing--

THE COURT: It was illegal.

MR. KLENOSKY: There was nothing proper in the--

THE COURT: I already told the jury the whole scheme was illegal.

MR. KLENOSKY: It affects the credibility of the--

THE COURT: How can it?

They already know it's illegal.

MR. KLENOSKY: Not quite. Even among themselves they have a--

THE COURT: I know. They had a code where they were kidding each other along, and there's no honor among thieves. Do you want me to tell them that? I'm going to tell them they can take notice of the fact the whole scheme was illegal. The only

question is was your man--did he have any part in it? That's the case. That's it from here on.

All right. We are through. We have run the gauntlet.

(End of side bar.)

THE COURT: All right. As far as this scheme that they were involved in, there is no question that the whole scheme was illegal. No question about it. No one disputes it. I don't think anyone disputes it.

The question is whether these two gentlemen sitting here had anything to do with it. That's the question in the case.

MR. MARKS: With respect to the illegality of the scheme, your Honor, perhaps we can get a stipulation from counsel to that effect. The Government will stipulate the scheme was illegal.

THE COURT: No question about it.

MR. KLENOSKY: No, I won't stipulate to that.

THE COURT: The question is whether they had anything to do with this matter in any respect whatsoever. If they didn't, then the jury knows what it must do.

All right.

MR. MARKS: Will counsel stipulate that the

scheme was--

MR. KLENOSKY: On the basis of the--

THE COURT: All right, we don't need any. On the face of it, it's illegal.

MR. GALLAGHER: I will be happy to stipulate that this witness's partnership--

THE COURT: Was illegal.

MR. GALLAGHER: It was illegal, and his activities were illegal. But in no way do I intend to imply that my defendant had anything to do with it.

THE COURT: I just told the jury that.

MR. MARKS: Very good.

THE COURT: That's the question involved. If they had nothing to do with it. If the defendants had nothing to do with it, then you jurors know exactly what you must do. Because, as I instructed you--

MR. MARKS: Will you put your stipulation on the record.

MR. KLENOSKY: Well, I am not prepared to dictate a stipulation into the record at this time.

THE COURT: No. He just wants to know, do you want to stipulate the scheme was illegal, without conceding your defendant had anything to do with it?

Q By the way, have you had a chance to speak to Robert Kuzniewski?

A Yes, I have.

Q Have you discussed with him the synthesis of PCP?

A Yes, sir, I have.

Q On the basis of those discussions, did you form an opinion as to whether or not he knew how to synthesize PCP?

A Yes.

MR. GALLAGHER: Objection.

THE COURT: I'll allow it as an expert.

A Yes, I did.

Q What is your opinion, sir?

A I felt that he could certainly synthesize PCP, because he discussed with me the synthesis of certain other analogues which are slightly changed or modifications in the reactions which would, although the reaction would go similarly, the end product would be slightly different from the phencyclidine, and this shows that he had very good working knowledge of the reactions; so that he wasn't just following it from a cookbook. This is how I was impressed with the method that he used or I said he had used in various syntheses.

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The answer should be yes or no.

Whether or not he can tell us about the conversation is another problem.

Q Who was that conversation with?

A Mark Janusez.

Q What did he say?

THE COURT: No.

MR. MARKS: We have a conspiracy already.

THE COURT: I understand that.

Proceed.

Q What did Mr. Janusez say to you?

MR. GALLAGHER: Objection.

THE COURT: I will allow it.

A That he would be responsible for giving Billy Miller and Jimmy Korzeniewski the angel dust.

Q Did he say how much?

A One pound.

Q Did there come a time when you had a conversation with Bob Kuzniewski about that one pound of angel dust?

A Yes.

MR. GALLAGHER: I object to anything after yes.

THE COURT: He asked him what the conversa-

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

v.

Docket No. 77-1148

WILLIAM JAMES MILLER and JAMES STANLEY KORZENIEWSKI, JR.,

Appellants.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief for Appellant William James Miller and Joint Appendix on the United States Attorney for the Eastern District of New York by mailing a copy of same to him at 225 Cadman Plaza East, Brooklyn, N.Y. this 9th day of May 1977. I am a member of the bar of this Court.

Donald E. Davi